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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 369

AMERICAN FARM LINES, APPELLANT

v.

BLACK BALL FREIGHT SERVICE, ET AL.

No. 382

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

BLACK BALL FREIGHT SERVICE, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION[1]

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[1] Although the United Sates did not appeal from the decision below, it supports the Interstate Commerce Commission's position on the merits. This brief is filed for the United States as appellee in both No. 369 and No. 382 and for the Interstate Commerce Commission as appellee in No. 369 and is appellant in No. 382.

OPINIONS BELOW

The opinion of the district court (A. 388a–399a) is reported at 298 F. Supp. 1006. The orders of the Interstate Commerce Commission (A. 143a–144a, 367a–370a) are unreported.

JURISDICTION

The judgment of the three-judge district court was entered on March 26, 1969 (A. 400a). The notice of appeal in No. 369 was filed by American Farm Lines on May 23, 1969 (A. 7a). The notice of appeal in No. 382 was filed by the Interstate Commerce Commission on May 26, 1969[2] (A. 7a). Probable jurisdiction was noted in each case and the appeals were consolidated on October 27, 1969. Jurisdiction to review the district court's judgment is conferred by 28 U.S.C. 1253 and 2101(b). *Pan-Atlantic Steamship Corp.* v. *Atlantic Coast Line R.R. Co.*, 353 U.S. 436; *American Trucking Associations, Inc.* v. *United States*, 364 U.S. 1.

STATUTES AND REGULATIONS INVOLVED

Section 210a(a) of the Interstate Commerce Act, as amended, 49 U.S.C. (1958 ed.) 310a(a); the Interstate Commerce Commission's temporary authority rules, 49 C.F.R. 1131; and certain of the Commission's rules of practice, 49 C.F.R. 1100, are set forth in pertinent part in Appendix A to this brief, pp. 29–33, *infra*.

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission may grant a motor carrier's application for temporary

[2] May 25, 1969 was a Sunday.

authority to perform immediately and urgently needed service under 49 U.S.C. 310a(a) when the carrier's application reasonably, but not literally, complies with the information requirements of the Commission's temporary authority rules.

2. Whether the Commission had jurisdiction to reopen its proceedings after protestants sought review by a three-judge district court and a single district judge issued a temporary restraining order.

STATEMENT

These consolidated cases are appeals from a judgment of a three-judge district court (A. 400a) setting aside the appellant Interstate Commerce Commission's grant to the other appellant, American Farm Lines (AFL), of temporary authority to perform certain transportation services[3] for the Department of Defense (DOD) pursuant to Section 210a(a) of the Interstate Commerce Act, 49 U.S.C. 310a(a) (A. 143a–144a, 367a–370a).[4]

1. *The Department of Defense and American Farm Lines.* AFL is an agricultural cooperative formed for the purpose of providing transportation services for its members, which also are agricultural coopera-

[3] The transportation services consist of movements of general commodities, including Class A and B explosives, moving on government bills of lading over irregular routes at reduced rates (see 49 U.S.C. 22), between points in Kentucky, Indiana, Illinois, Missouri, Arkansas, Louisiana, Texas, Oklahoma, and Kansas on the one hand, and points in Washington, California, Nevada, Utah, and Arizona, on the other (A. 370a–371a).

[4] The Commission is not appealing from the court's decision setting aside the first of the two orders, and the argument below entirely concerned the validity of the second order.

tives. As such, it operates pursuant to the exemption from the Act's certificate requirements provided in Section 203(b)(5) of the Act, 49 U.S.C. 303(b)(5). In 1966, AFL began serving DOD. It did so without a certificate authorizing the service since the Commission construed Section 203(b)(5), as it then read, to allow cooperatives to transport freight for non-members to the extent that such transportation is "incidental and necessary" to the cooperatives' primary transportation activities. See *Northwest Agricultural Co-Op. Ass'n* v. *Interstate Commerce Commission*, 350 F. 2d 252 (C.A. 9), certiorari denied, 382 U.S. 1011.

AFL's ability to serve DOD was sharply curtailed in 1968 for two reasons. First, certificated munitions carriers obtained injunctions in private actions under 49 U.S.C. (Supp. IV) 322(b)(2), prohibiting AFL from making two consecutive movements for DOD and from transporting freight for any non-members except when going to pick up, or returning from delivery of, a member's freight.[5] Second, Congress amended Section 203(b)(5) in that year to restrict a cooperative's authorized transportation of freight for non-members to that "which is incidental to its primary transportation operation and necessary for its effective performance * * * [such transportation for non-members] shall in no event exceed 15 per centum of its total interstate transportation services in any

[5] *Munitions Carrier Conference, Inc.* v. *American Farm Lines*, Civil Nos. 67-487 and 68-148 (W.D. Okla., February 20, and May 28, 1968). The Commission intervened as a plaintiff in these actions to enforce the scope of the agricultural cooperative exemption contained in 49 U.S.C. 303(b)(5) prior to its amendment in 1968.

fiscal year, measured in terms of tonnage."[6] In the same amendment, Congress also specifically defined non-member service as including service to the government. See 82 Stat. 448–449.

2. *AFL's application for temporary authority.* In an effort to continue its service to DOD, AFL, in May 1968, filed an application under Section 210a(a) of the Interstate Commerce Act, 49 U.S.C. 310a(a) for temporary authority to serve DOD (A. 10a).[7] Approximately 125 motor and rail carriers protested. DOD filed a statement, dated May 15, 1968, in support of the application pursuant to the Commission's Temporary Authority Rules, 49 C.F.R. 1131.2(c)(A. 14a–15a). The Commission also had before it an earlier letter, dated April 30, 1968, from a representative of DOD to the General Manager of AFL stating that while DOD regarded AFL's service to be "fast, efficient, responsive, and economical," and that while it is "desirous" of further use of AFL's services, DOD nevertheless, "is not in a position to state that there would be insufficient or inadequate service without American Farm Lines" (A. 392a–393a, 11a–12a; see also A. 139a–141a).

[6] Section 203(b)(5) had previously simply exempted from the Act's certificate requirements:

> [M]otor vehicles controlled and operated by a cooperative association as defined in the Agricultural Marketing Act, approved June 15, 1929, as amended, or by a federation of such cooperative associations, if such federation possesses no greater powers or purposes than cooperative associations so defined * * *. [49 U.S.C. (1964 ed.) 303 (b)(5).]

[7] In July 1968 AFL filed an application for permanent authority to serve DOD. Proceedings on that application are currently in process before the Commission (Docket No. MC–129908 (Sub-No. 1).

The Commission's Temporary Authority Board denied the application on July 12, 1968 (A. 141a-142a) but, upon AFL's petition for reconsideration, Division 1 of the Commission (acting as an Appellate Division) reversed the Board and on September 3, 1968 granted AFL temporary authority for 90 days (A. 143a–144a). Petitions for reconsideration were filed by more than 20 protesting carriers, some requesting a stay of the effective date of the grant of authority pending disposition of the petitions. The Commission refused such a stay (A. 146a, 147a, 148a), and its order became effective on September 16, 1968.

On September 26, 1968, while the petitions for reconsideration were still pending before the Commission protesting carriers sued for review of the Commission's order in the court below (A. 149a–158a). On October 2, 1968, after a hearing in which counsel for the government participated, a single judge temporarily restrained the operation of the Commission's order (A. 166a–167a); on October 9, 1968 the Commission itself ordered postponement of the operation of its grant in accordance with the order of the court (A. 169a–169b).

On October 16, 1968, DOD filed with the Commission a reply to the pending petitions for reconsideration which had been submitted by the protesting carriers; DOD's reply specified additional reasons in support of AFL's application (A. 391a). On October 17, 1968, along with a reply to the petitions for reconsideration, AFL filed a petition asking the Commission to reopen its proceeding (A. 391a). On November 5, 1968, the Commission ordered the reopening

of the proceeding for the stated purpose of receiving a verified statement from DOD specifying "the commodities and points between which there is an immediate and urgent need for applicant's proposed service which cannot be met by existing carriers," and of receiving verified statements from protesting carriers in response to the statement to be submitted by DOD (A. 170a–171a). On November 12, 1968, the Commission notified the court of the reopening and moved for a stay of the judicial proceeding; this motion, however, never came on for hearing (A. 391a–392a).

3. *DOD's statement of need for AFL's services.* DOD's verified statement, given by Vincent F. Caputo, the Department's Director for Transportation and Warehousing Policy (A. 194a–209a), described the "tremendous volume of traffic" which must move between points in the regions covered by AFL's application (A. 194a–198a). A part of this traffic must move by the most expeditious means possible and, since air transport is for the most part prohibitively expensive, there is an "imperative" need for the most expeditious motor carrier service (A. 198a).

The statement noted that "in many, many instances" the carriers currently certificated to serve DOD had failed to meet this need (A. 198a), and gave three reasons for this inadequacy: (1) Most of the certificated carriers provide service only on a joint line basis, rather than single line, and a "substantial" part of their service requires the participation of at least three different carriers, with the result in some

cases of very substantial delays (A. 198a–199a); the statement listed numerous pairs of major shipping points between which no certificated carriers have single line authority (A. 201a–203a). (2) Virtually all of these carriers are regular route carriers and thus must travel along prescribed routes which are often less direct and thus more time consuming than routes which can be taken by carriers with irregular route authority (A. 199a). (3) Some regular route carriers use single drivers (who must be relieved at relay points) rather than two-man driving teams, and some also use power units which must be changed at relay points; as a result there are sometimes delays at the relay points when replacement drivers and power units are temporarily unavailable (A. 199a). DOD's statement then gave three examples of substantial delays occurring in movements where service was not available from irregular route carriers on a single line basis with the use of two-man driving teams (A. 200a).

Moreover, DOD stated, because the currently certificated carriers had only "bits and pieces of authority," none could provide comprehensive service for all commodities, including explosives, between all points in the two regions covered by AFL's application (A. 200a–201a). Because of delays inherent in the system based upon "bits and pieces" of authority, on occasion there have been failures in the coordination of transportation with production schedules (A. 204a) and failures to make connections for overseas transportation (A. 205a). Moreover, it is frequently impossible

for the same carrier to carry both explosives and non-explosives having the same destination (A. 206a).

DOD concluded by contrasting the service provided by the currently certificated carriers with the "completely flexible and highly expedited service" (A. 207a) offered by AFL. When DOD began using AFL in 1966, it "was immediately discovered that the service of American Farm Lines was superior to that available from presently certificated motor carriers because its service was invariably provided by use of 'two-man driving teams' operating over the most direct routes possible from origin to destinations and which was available between any and all points in broad multi-state territories" (A. 206a). Noting that AFL's service is used to complement rather than replace the service of the presently certificated carriers, DOD then listed five examples where AFL provided service meeting defense requirements which could not otherwise have been met by the currently certificated carriers (A. 207a–208a). Moreover, reliance upon the currently certificated carriers "results in higher cost to the taxpayers" (A. 204a).

In their responses to DOD's verified statement, the protesting carriers asserted that they had satisfactorily performed all services previously requested of them and that they were willing and able to perform any service requested of them by any shipper, including DOD (A. 392a).

4. *The award of temporary authority.* On December 19, 1968, the Commission made a new grant of temporary authority, this time for 180 days. It did so upon finding that DOD "in discharging its responsibility

for the conduct of the Nation's defense" has an imperative need for the most expeditious service between innumerable points within the United States and abroad and that DOD has experienced "inefficient and circuitous joint-line transportation by the use of existing carrier service," particularly in coordination of motor transportation with manufacturing schedules and with overseas transportation (A. 368a). It further found (A. 368a):

> (3) That [DOD] has attempted but has been unable to obtain the required and necessary type of service and knows of no carrier in a position to meet its needs;
>
> (4) That there is nothing in this record to establish that any of the protesting carriers provide a service to meet its needs;

The Commission concluded that the grant of temporary authority was necessary to assure the government of a flexible service "to complement rather than replace existing services" (A. 368a–369.).

5. *The ruling of the District Court.* On December 31, 1968, protesting carriers filed in the district court a supplemental complaint attacking the Commission's second order; on January 6, 1969, a single judge temporarily restrained the operation of that order as well (A. 382a–383a). After full hearing on the merits, the full three-judge court, on March 26, 1969, set aside the Commission's grant of temporary authority.[8] It held,

[8] Since the Commission's second order in effect superseded the first, this litigation concerns only the validity of the second order, that of December 19, 1968. The Commission and the United States have conceded, *arguendo*, throughout this litigation that AFL's temporary authority is valid only if the second order is valid.

first, that the Commission had no jurisdiction to reopen the proceeding after the court assumed jurisdiction and stayed the operation of the first Commission order (A. 395a–398a). In this connection, the Court also held that the protesting carriers' petitions for reconsideration of the Commission's first order were invalid under 49 C.F.R. 1131.6(a) (set forth in Appendix A, pp. 31–32, *infra*), and therefore that there was nothing properly pending before the Commission when it initiated the proceedings leading to the second order. The Court further held that the DOD supporting statement upon which the second order depended did not conform with the framework for such statements specified in the Commission's temporary authority rules, 49 C.F.R. 1131.2(c). Thus, the Court held, even if the reopening were proper, the Caputo verified statement failed to meet the requirements of 49 C.F.R. 1131.2(c)(8) and (9), in that it did not show any efforts by DOD "to obtain from existing carriers the service AFL seeks to provide, or the identity of any existing carriers who failed or refused to provide the needed service and the reasons given for any such failure or refusal" (A. 398a–399a). Having noted that in the April 30, 1968 letter DOD told AFL that it was not in a position to state that the existing service is inadequate, the court construed the Caputo verified statement as merely expressing DOD's "preference" for AFL's service (A. 398a). This, it held, did not constitute the "full compliance with all mandatory ICC rules" (in which category the literal language of subsections (8) and (9) falls) that is prerequisite to a grant of temporary authority (A. 398a).

ARGUMENT

INTRODUCTION AND SUMMARY

Section 210a(a) of the Interstate Commerce Act, 49 U.S.C. 310a(a), provides that whenever there is "an immediate and urgent need" for motor carrier service where there is "no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings," grant an application for temporary authority to meet the need. In 1965, after some twenty-five years of experience under the statute, the Commission adopted temporary authority rules, 30 F.R. 5836, 49 C.F.R. 1131. The rules include specifications of general categories of information to be set forth in shippers' statements supporting applications for temporary authority (49 C.F.R. 1131.2(c)). This information is intended, as the Commission explained in a subsequent public statement,* to assist the Commission in determining the extent and urgency of shipper need, as well as the capability of existing service to meet that need.

The court below held that the Commission's grant of temporary authority for American Farm Lines to serve the Department of Defense was invalid because of asserted deficiencies in that shipper's supporting statement of need. The grant was invalidated not because the court found the statement, with the other evidence of record, insufficient to support the findings required by the governing statute. Rather, it was solely because the court considered that the statement did not literally enough fit the framework that the

* See Appendix B, *infra*.

Commission had laid out in its rules for the purpose of gathering information pertinent to the statutory findings. Specifically, the court found that DOD had not given the particulars "mandatorily required" (A. 398a) by subsections (8) and (9) of 49 C.F.R. 1131.2 (c). These provide that a supporting shipper must state "(8) Whether efforts have been made to obtain the service from existing motor, rail, or water carriers and the dates and results of such efforts" and "(9) Names and addresses of existing carriers who have either failed or refused to provide the service, and the reason given for such failure or refusal."

We believe that the district court held the Commission to a far too meticulous and rigid adherence to the literal language of the rule, giving too little attention to the underlying statutory purpose and the Commission's own intentions in promulgating the rules. The DOD statement did in fact provide the Commission with the information lawfully required for the statutory finding of a need that cannot otherwise be met, and thus the purpose of the rules was entirely satisfied. DOD documented its inability to obtain the needed service from other existing shippers and the reasons for such inability. The only literal failure of compliance with subsections (8) and (9) was the absence of complete listings of specific dates when DOD was denied service and of the names and addresses of all carriers which denied service. The failure of this unique shipper, with its vast volume of traffic moving among multitudinous points, to provide such details is entirely understandable, and

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their absence neither impaired the Commission's ability to make lawful findings justifying a grant of temporary authority nor prejudiced substantially the protestants' efforts to rebut AFL's application. Thus, there was reasonable compliance with the rules, as this Court has recently established by its summary affirmance in *Estes Express Lines* v. *United States*, 292 F. Supp. 842, affirmed *per curiam*, 394 U.S. 718.

Setting up these provisions of the Commission's rules as a procedural obstacle to the grant of needed temporary authority unduly hampers the Commission in exercising the discretion that Congress gave it in Section 210a(a) of the Act to deal with urgent public transportation needs. The Commission's purpose in adopting the rules was simply to facilitate its gathering of the information needed under the statute, and that purpose was achieved by DOD's statement. The Commission gave full and fair consideration to the protestant's objections, and its performance of its statutory duty should not be upset on insubstantial technical grounds.

Alternatively, the court below held that the temporary authority granted AFL was invalid because the pendency of judicial review of the Commission's earlier order deprived the agency of jurisdiction to entertain the DOD statement. But the administrative proceeding was then still in process because petitions for reconsideration that protestants had filed (consistent with the Commission's rules) were still pending after they filed their complaint seeking judicial review. In any event, the Commission has power to take action pending judicial review—whether parties

have previously requested it or not—so long as its action is not inconsistent with the jurisdiction of the reviewing court. See *Inland Steel Co.* v. *United States,* 306 U.S. 153, 159–160. Here, in contrast to the typical statute providing for judicial review in a court of appeals, there is no statutory limitation upon agency action pending review. And in this case there was no inconsistency between the Commission's receipt of the DOD statement (with prior notice to the court) and the judicial review proceeding, which had gone no further than the issuance of a temporary restraining order by a single judge. There was no prejudice to any party—other than the frustration of litigants' desire to preserve agency errors—when the Commission acted to correct the deficiency it discovered after the complaint for review was filed.

I

THE COMMISSION'S GRANT OF TEMPORARY AUTHORITY SHOULD BE UPHELD SINCE THERE WAS REASONABLE COMPLIANCE WITH THE COMMISION'S RULES AND EVIDENCE IN THE RECORD AS A WHOLE TO SUPPORT GRANT

Contrary to the view of the court below, Mr. Caputo's verified statement expressed more than the Department of Defense's bare "preference" for AFL's service (A. 398a), and thus reasonably complied with the temporary authority rules in the light of all the circumstances.

DOD's statement showed that a part of its "tremendous volume" of traffic—including that for which AFL's service was desired—required the most expe-

ditious service. In addition to cost considerations, DOD set forth two specific reasons why such service was necessary: (1) to coordinate DOD transportation with manufacturing schedules and (2) to coordinate domestic transportation with overseas movements (A. 204a–205a). Both of these reasons were cited by the Commission in its order (A. 368a). DOD further stated that most of the carriers serving it had only "bits and pieces" of authority, and it gave three reasons why such carriers were generally unable to provide the most expeditious service (A. 198a–199a, 200a–201a). DOD cited three specific instances of substantial time delay where service is provided by joint line service (A. 200a), numerous pairs of major shipping points between which there is no single line service available (A. 201a–203a), and, finally, five instances in which AFL, combining single line service with irregular routes and two-man driving teams, met DOD requirements that could not otherwise have been met by the currently certificated carriers (A. 207a–208a).

The district court found, without any analysis, that the DOD statement did not satisfy subsections (8) and (9) of 49 C.F.R. 1131.2(c). But in fact the statement did provide much of the information there specified. Thus, DOD did state whether it had made efforts to obtain the service from existing carriers, and graphically described the results of its efforts, as subsection (8) dictates. And it explained in detail the reasons why existing carriers were unable to provide the service needed, as subsection (9) contemplates. We acknowledge that the statement did not give the dates of DOD's efforts to secure service (as (8) fur-

ther asks) or the names and addresses of the carriers who do not provide service (as (9) specifies). But these are the only deficiencies, and it is not hard to understand why this unique shipper, with its enormous volume of varied traffic moving between multitudinous points, would find it substantially impossible to provide such intricate details. It was appropriate for the Commission to proceed without those details in this case, and their absence can offend only the most finicky notion of what constitutes reasonable compliance with the rules.

Given the fact that the Commission had before it the information it needed to determine whether AFL's application met the statutory requirements, it is difficult to see how the absence of names, addresses and dates prejudiced the protestants in this case. The numerous protestants introduced a great deal of evidence in opposition to the DOD statement (see A. 210a–363a) in which they attempted to show that existing carriers could provide the needed service. Their rebuttal failed to convince the Commission (A. 368a), but there is no reason to believe that names, addresses and dates would have changed the weight of the evidence. In short, DOD's statement and the responses of the protesting carriers, considered together, clearly provided ample basis for "a fair adjudication" of the merits of the application for temporary authority.[10]

[10] DOD's letter to AFL of April 30, 1968 (see p. 5, *supra*), goes only to the question of the weight to be given to the Caputo verified statement, a matter for the Commission, not the court. See *Roadway Express, Inc.* v. *United States*, 263 F. Supp. 154, 158.

The insistence of the court below upon rigid compliance with subsections (8) and (9) is inconsistent with Congress' intent in Section 210a(a) to confer a broad and flexible discretion on the Commission to deal with the public's urgent transportation needs. It converts an administrative rule intended only to facilitate the development of relevant information for the Commission's benefit into an inflexible procedural obstacle. Given the limited nature and purpose of the rule, its literal terms should not stand in the way of a Commission determination that a supporting statement reasonably complies with the rule as a whole and that, based on all the information available, temporary authority should be granted in the public interest.

This Court so held when it summarily sustained the Commission in *Estes Express Lines* v. *United States,* 292 F. Supp. 842, affirmed *per curiam,* 394 U.S. 718. In that case a three-judge district court upheld a grant of temporary authority even though shippers statements did not literally satisfy subsections (8) and (9), because in the circumstances of the case the shippers' responses were reasonable and the record as a whole justified the Commission's grant of authority. See also *Bell Lines* v. *United States,* Civil Action No. 3759 (S.D. W. Va.);[11] *Roadway Express, Inc.* v. *United States,* 263 F. Supp. 154, 157

[11] An appeal was noted to this Court by Bell Lines, and a jurisdictional statement was recently filed in No. 893, this Term, claiming a conflict with this case and *Acme Cartage Co.* v. *United States*, 290 F. Supp. 453 (W.D. Wash.).

(N.D. Ohio); *Superior Trucking Co.* v. *United States*, 302 F. Supp. 257 (N.D. Ga.).[12]

The result in *Estes* follows directly from the policy of flexibility expressed in Section 210a(a). That policy is intended to provide the Commission with a swift and procedurally simple ability to respond to urgent transportation needs. No formal adversary proceedings are required by the statute; the Commission can grant temporary authority "without hearings or other proceedings." Furthermore, decisions on temporary authority are expressly committed to the Commission's discretion and must be upheld if there is any evidence supporting them. See *Union Cartage Co.* v. *United States*, 244 F. Supp. 1005 (D. Mass.).[13] The only requirements imposed are that there be "an immediate and urgent need" and that existing service be incapable of meeting that need.

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[12] There is some support for the decision below in the decision by the same district court below (with two of the three judges being the same) in *Acme Cartage Co.* v *United States*, *supra*, n. 11. Although there is the suggestion in that opinion that full compliance with subsections (8) and (9) is mandatory, the narrow holding, however, is that less than full compliance is fatal where the information required by those subsections does not appear elsewhere in the record.

[13] The courts have consistently held that the test of validity of a Commission order granting or denying temporary authority is not whether it is supported by substantial evidence, as is the case where an order concerning permanent authority is under judicial review, but whether the Commission had legal authority and any evidence on which to act as it did in the circumstances before it. See, *e.g.*, *Roadway Express, Inc.* v. *United States*, 263 F. Supp. 154, 159 (N.D. Ohio); *Merchants Delivery Co.* v. *United States*, 265 F. Supp. 669, 671-672 (W.D. Mo.); and *Bert Hussey* v. *United States*, 271 F. Supp. 650, 653-654 (N.D. Calif.).

The construction of the Commission's temporary authority rules adopted by the court below is clearly inconsistent with the Congressional policy because it would limit the Commission's ability to act in emergency situations even though the record before it establishes the requirements of Section 210a(a). As the court observed in *Superior Trucking Co.* v. *United States, supra,* 302 F. Supp. at 263, "[i]t is particularly inappropriate to strictly bind an agency to regulations made under a statute designed to encourage summary procedures."

Nor is it reasonable to conclude that by adopting the temporary authority rules in 1965 the Commission intended to limit the flexibility which it had possessed since 1938, when Section 210a(a) was enacted. Rather "a reading of these rules indicate[s] that their purpose is to facilitate the Commission's handling of requests for temporary authority. The rules reflect no intention to reduce or relinquish its statutory discretionary power to issue certificates of temporary authority." *Roadway Express, Inc.* v. *United States, supra,* 263 F. Supp. 154, 159 (N.D. Ohio). This interpretation is supported by the Commission's statement of January 23, 1968, which described the purpose of the rules and warned that applications for temporary authority would be rejected if they did not "adequately" comply with the Commission rules.[14] The Commission explained that "Because of 'slip-shod' preparation of many of the applications, [Division 1]

[14] The full text is set forth in Appendix B to this brief, pp. 34–35, *infra.* (See also *Acme Cartage Co.* v. *United States, supra,* 290 F. Supp. at 456–457, n. 4.)

frequently has found it difficult to reach an informed and equitable decision," and that the failure of supporting statements to provide all the information required by 49 C.F.R. 1131.2(c) was a foremost cause for concern. In summary it stated:

> [A]ccording to the clarified policy, Division 1 will deny temporary authority applications in which, because of noncompliance with the rules, a fair adjudication is not possible on the record before the Commission, without prejudice, however, to the filing of a new application conforming to the rules.

Thus it is clear that the purpose of the rule was to facilitate the gathering of enough evidence to permit "a fair adjudication" by the Commission on the merits of an application, and not to restrict its own powers in dealing with emergency situations, or to confer special procedural benefits upon protesting carriers. As we have shown, there was such a "fair adjudication in this case."

Moreover, no significant or useful purpose under Section 210a(a) would be served by imposing a requirement that there must be literal and complete production in every case of each category of information sought by the rules. For example, as some appellees concede, a supporting shipper's statement would be in full and literal compliance with the rules if it stated simply that no efforts were made to obtain the urgently needed service from existing carriers.[15] This would not, of course, end the Commission's inquiry.

[15] Motion to Affirm of Consolidated Freightways, *et al.*, p. 26. As we have shown, DOD, the supporting shipper here, provided far more information than this.

It would still have to ascertain whether existing service was capable of meeting the claimed need. And opposing carriers would undoubtedly attempt to bring to the Commission's attention information showing that existing service could do the job. Additionally, the Commission's field staff would investigate this question. If all available information showed that existing service was capable of meeting the shipper's alleged need, the application for temporary authority would be denied under standards of the statute.

In short, the information requirements of the rule are simply an aid to the Commission in the exercise of its discretion under Section 210a(a). They confer no rights on protesting carriers and do not limit the Board's discretion. So long as there is reasonable compliance with the rule—thus avoiding the risks that applicants may not be treated equally, or that the Commission may not get quick access to the information it needs—the purposes of Section 210a(a) are met.

This is, therefore, not a case in which an agency has failed to adhere to rules, deliberately adopted to limit otherwise unfettered discretion, which conferred important procedural benefits upon individuals. *Service* v. *Dulles,* 354 U.S. 363; *Vitarelli* v. *Seaton,* 359 U.S. 535. Nor is it a case in which an agency required by rule to exercise independent discretion has failed to do so. *Accardi* v. *Shaughnessy,* 347 U.S. 260; *Yellin* v. *United States,* 374 U.S. 109. On the contrary, that is precisely what the Commission has done here. The protestants have had full and fair administrative con-

sideration of their position. Indeed, the position taken by the district court would deny an applicant (and shippers) equal consideration by setting up an artificial rule of pleading as an obstacle to the Commission's exercise of the discretion Congress entrusted to it in Section 210a(a).

II

THE COMMISSION HAD JURISDICTION TO REOPEN ITS PROCEEDING DESPITE THE COMMENCEMENT OF A JUDICIAL REVIEW PROCEEDING

After the Commission issued its first order, many protesting carriers filed petitions for reconsideration, some requesting a stay of the operation of the Commission order pending disposition of the petitions. The Commission refused the stay, and the order granting the temporary authority became effective. Shortly thereafter, some of the protesting carriers, including many which had petitioned for reconsideration, filed suit and the court, by a single judge, temporarily restrained operation of the Commission's first order. Meanwhile, the petitions for reconsideration were still pending, and after replies by DOD and AFL, the latter requesting a reopening of the Commission's proceeding, the Commission did reopen the proceeding. It was then that the Caputo verified statement was received, more than a month before the merits of the case were argued before the three judge court.

The district court erred in its alternative holding that the pendency of the review proceedings deprived the Commission of jurisdiction to reopen the administrative proceeding as it did. In fact, the administra-

tive proceeding was not yet completed, since the Commission still had pending before it the petitions for reconsideration filed by protestants. To be sure, this lack of administrative finality did not deprive the court of jurisdiction to issue the restraining order or to proceed with review of what the Commission had already done; it is clear that a court may provide temporary injunctive relief to prevent immediate and irreparable injury pending reconsideration of a Commission order if the order is already operative and the Commission does not provide needed relief, see *Pacific Inland Tariff Bureau* v. *United States,* 129 F. Supp. 472 (D. Ore.); *Cantlay & Tanzola* v. *United States,* 115 F. Supp. 72 (S.D. Calif.). But the fact that a court may have jurisdiction to review and to provide temporary injunctive relief does not however, mean that the Commission thereby loses all jurisdiction to complete the administrative process. Since the matter was still properly before the Commission, the Commission necessarily had jurisdiction to reopen it. Indeed, this authority does not even depend on the pendency of petitions for rehearing; Section 17 of the Act, 49 U.S.C. 17(6) and (7), "empowers the [C]ommission at any time to grant rehearings as to any decision, order, or requirement and to reverse, change or modify the same." *Baldwin* v. *Milling Co.,* 307 U.S. 478, 484. See also *Sprague* v. *Woll,* 122 F. 2d 128 (C.A. 2), certiorari denied, 314 U.S. 669.[16]

[16] The district court erred in concluding that the petitions for reconsideration were invalid and thus could not have the effect of keeping the administrative proceeding open. In granting AFL temporary authority, Division 1, acting as an appellate

When Congress has intended that the pendency of a proceeding to review agency action shall absolutely preclude further agency action in the matter, it has expressly provided that the jurisdiction of the reviewing court shall be exclusive and has established specific

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division, reversed the Temporary Authorities Board. Therefore, petitions for reconsideration could be filed under 49 C.F.R. 1100.101(g) of the Commission's General Rules of Practice, (p. 33, *infra*) which permits such petitions where an appellate division, as here, reverses the initial decision of a board.

Contrary to the ruling below, the provision for reconsideration in the temporary authority rules (49 C.F.R. 1131.6) does not restrict the right vested under the Commission's General Rules of Practice; in fact the latter are expressly incorporated in it. Rule 1131.6 merely spells out the right to petition for reconsideration of orders of the Temporary Authorities Board or the Division *initially* granting or denying temporary authority. The Commission has consistently recognized the right to petition for reconsideration of an order of Division 1, acting as an appellate division, which reverses an order of the Temporary Authorities Board. So, apparently, did the protesting carriers, many of them are appellees here, which filed the petitions. The court's rigid construction of the rules is itself plainly out of keeping with Rule 2 of the Commission's Rules of Practice, 49 C.F.R. 1100.2, which provides:

> The rules in this part shall be liberally construed to secure just, speedy, and inexpensive determination of the issues presented.

The court's reliance upon 49 C.F.R. 1100.101 (a)(2) is misplaced. That rule provides in relevant part:

> All decisions, orders, or requirements of a division of the Commission in any proceeding shall be considered administratively final, except * * * those wherein the division reverses, changes or modifies a prior decision by a hearing officer * * *.

The court's view that the Temporary Authorities Board, whose initial decision was reversed by Division 1, is not a "hearing officer" (A. 396a) is contrary to the definition contained in 49 C.F.R. 1100.5(f) which defines "officer" as including "* * * a board of employees * * *."

procedures for application to the court for a remand to permit further agency action. See, *e.g.*, Hobbs Act, 28 U.S.C. 2342, 2347(c), 2349; Federal Trade Commission Act, 15 U.S.C. 45(c); § 11 of the Clayton Act, 15 U.S.C. 21(c); Labor Management Relations Act, 29 U.S.C. 160(d), (e). But neither the Interstate Commerce Act nor the Urgent Deficiencies Act, which apply here, has any such provisions; the only limitation upon the Commission's power pending review by way of an action for injunction before a three-judge court is the principle—inherent in the nature of judicial review—that the Commission cannot act in a manner inconsistent with the jurisdiction of the court. See *Inland Steel Co.* v. *United States*, 306 U.S. 153, 159-160. No further limitation upon an agency can be inferred from the simple statutory establishment of review procedures; Congress has been careful to provide such limitations expressly when it has considered them appropriate, and their absence here is therefore meaningful."

There is no inconsistency here between the Commission's action in reopening the proceeding and issuing a second order upon further evidence, on the one hand, and the court's action supplying the temporary relief which the Commission had denied and the prospect of judicial review on the merits, on the other

"The Commission has proposed legislation to amend Section 17 of the Act to provide for review of its orders in courts of appeals. The proposed legislation would limit the Commission's power to reopen to the period prior to the docketing of the record (see S. 2242, 91st Cong., 1st Sess.), thus bringing the procedure for review into line with other statutes providing for review in the courts of appeals.

hand. The Commission informed the court of its action, and there was no evasion of the stay of the first order. The court had an opportunity to stay operation of the second order pending review and, in fact, did so.[18]

There was no prejudice to any party in the review proceeding.[19] Obviously, no party has a right to have an agency's errors preserved pending review. See *Wrather-Alvarez Broadcasting* v. *Federal Communications Commission*, 248 F. 2d 646, 648 (C.A. D.C.) The Commission reopened merely for the purpose of determining whether a deficiency discovered during review could be remedied before the full three-judge court commenced its review on the merits.[20] Absent any statutory prohibition, it was free to do so.

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[18] Since the Commission never lost jurisdiction, the permission of the court to reopen was not necessary. See *Atchison, Topeka* and *Santa Fe Ry. Co.* v. *United States*, 231 F. Supp. 422, 426–427 (N.D. Ill.) Cf. *Anchor Line Limited* v. *Federal Maritime Commission*, 299 F. 2d 124, certiorari denied, 370 U.S. 922.

[19] The protesting carriers had ample opportunity to reply to the Caputo statement, and they did so. They also obtained temporary relief from the second order and full review of that order.

[20] Before issuing its order of November 5, 1968, reopening the proceeding, the Commission was not only aware of the court's action restraining the operation of the first order but also of the court's decision in *Acme Cartage Co.* v. *United States*, *supra*, entered on October 4, 1968, both of which indicated deficiencies in the first order.

CONCLUSION

For the reasons stated, the judgment of the district court should be reversed and the cause remanded with instructions to sustain the final order of the Commission by dismissing the complaints.

Respectfully submitted.

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APPENDIX A

1. The Statute

Section 210a(a) of the Interstate Commerce Act, as amended, 49 U.S.C. (1958 ed.) 310a(a), provides:

> To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier or a contract carrier by motor vehicle, as the case may be. * * *

2. The Temporary Authority Rules

49 C.F.R. 1131.2(c) provides:

> *Supporting statements.* Each application for temporary authority must be accompanied by a supporting statement(s) designed to establish an immediate and urgent need for service which cannot be met by existing carriers, except that when the Department of Defense is the shipper such support may be furnished directly to the Temporary Authorities Board by the Washington office of that Department. Each such shipper's statement, except those submitted by the Department of Defense must contain a certification of its accuracy and must be signed by the person (or an authorized representative thereof) having such immediate and

urgent need for motor carrier service. Any such supporting statement must contain at least the following information:

(1) Description of the specific commodity or commodities to be transported (where the transportation of property is involved).

(2) Points or areas to, from, or between which such commodities or passengers are to be transported. (If service is needed to or from a territory or area rather than a specific point or points, clearly describe such territory or area and furnish evidence of a broad need to justify the territorial grant of authority requested.)

(3) Volume of traffic involved, frequency of movement, and how transported now and in the past.

(4) How soon the service must be provided and the reasons for such time limit.

(5) How long the need for such service likely will continue, and whether the persons supporting the temporary application will support a permanent service application.

(6) Recital of the consequences if service is not made available.

(7) The circumstances which created an immediate and urgent need for the requested service.

(8) Whether efforts have been made to obtain the service from existing motor, rail, or water carriers, and the dates and results of such efforts.

(9) Names and addresses of existing carriers who have either failed or refused to provide the service, and the reasons given for any such failure or refusal.

(10) Name and address of motor carrier who will provide service and is filing application for temporary authority.

(11) If the person supporting the application has supported any prior application for permanent or temporary authority covering all or any part of the desired service, give the carrier's name, address, and motor carrier docket number, if known, and state whether such application was granted or denied and the date of such action, if known.

49 C.F.R. 1131.4(b)(4) provides:

Single-line service. Generally, the desire of a shipper for single-line service in lieu of existing interchange or connecting-carrier service will not warrant a grant of temporary authority. A grant of temporary authority to effectuate single-line service will be authorized only when it is clearly established that the carriers providing multiple-line service are not capable of, or have failed in, meeting the reasonable immediate and urgent needs of shippers or receivers between the points or territories and in respect of the commodity or commodities involved.

49 C.F.R. 1131.6(a) and (c) provide:

(a) *Petitions for reconsideration.* Pursuant to and in accordance with the Commission's General and Special Rules of Practice, petitions for reconsideration of orders of (1) the Temporary Authorities Board, and (2) Division 1 initially granting or denying temporary authority in proceedings not subject to prior determination by the Temporary Authorities Board, may be filed by any interested person.

(c) *Petitions for reconsideration.* The filing

of a petition for reconsideration of an order of Division 1 or the Temporary Authorities Board does not have the effect of automatically staying such order, and the grantee carrier may conduct the operations authorized by such order upon compliance with its tariff, insurance, and other requirements for the duration of the temporary authority, or until otherwise ordered.

3. Rules of Practice

49 C.F.R. 1100.1 provides:

SCOPE OF RULES (RULE 1)

The rules in this part govern procedure before the Interstate Commerce Commission in proceedings under the Interstate Commerce Act and related acts, unless otherwise directed by the Commission in any proceeding.

49 C.F.R. 1100.5(f) provides:

The term "officer," except as a different meaning is indicated in Rules 17(b), 57 to 66, inclusive, 71(a) and 78 (civil and corporate functionaries), includes: (1) a Commissioner, a board of employees (called an "employee board" in this part), an examiner, or special board composed of State representatives (called a "joint board" in this part), to which a proceeding (called "referred matter" in this part) is by order assigned or referred for hearing, consideration, or recommendation of an appropriate order thereon pursuant to provisions of law;[1] and (2) a Commissioner, an examiner, or other Commission employee before whom, without entry of an order of reference, a proceed-

[1] Such as sections 17 and 205 of the Interstate Commerce Act.

ing is assigned for hearing. The term "board" means either an employee board or a joint board as the context requires.

49 C.F.R. 1100.101(g) provides:

> *Petitions for reconsideration of appellate division decisions on review of board decisions.* When an appellate division has denied a petition seeking a reversal, change, or modification of a determination whether original or on review by a board of employees, any further petition for reconsideration by the same party or parties upon substantially the same grounds will not be entertained. If in the consideration of such a petition, however, by the appellate division, the previous determination of the board of employees has been reversed, changed, or modified, a further petition may be filed by any party to the proceeding adversely affected by the decision of the appellate division, within the time specified in paragraph (e) of this section, and the petition will be considered and disposed of by the same appellate division which passed upon the initial petition.

49 C.F.R. 1100.225 prescribes "Special rules of practice governing the procedure of the Temporary Authorities Board" and other employee boards. In a footnote to the title of these special rules, it is provided that:

> The general rules of practice apply to the procedure of all employee boards except to the extent specifically provided for in Rules 200 and 225.

APPENDIX B

ICC POLICY RELEASE OF JANUARY 23, 1968

POLICY CLARIFIED FOR ICC ACTION ON APPLICATIONS FOR TEMPORARY AUTHORITY TO CONDUCT MOTOR CARRIER OPERATIONS

Requests for temporary authority to conduct regulated motor carrier service will be turned down if the applications do not adequately comply with Interstate Commerce Commission rules.

The clarified policy will be administered by Division 1, which handles operating rights matters.

The Commission adopted this policy upon receiving recommendation from the Division because of the haphazard preparation of many of the more than 5,000 applications for temporary authority received annually. Most of the requests involve common carrier trucking. The applications usually result from an emergency or short term need of shippers, or when new products and commodities are developed and require immediate transportation services.

Because of "slip-shod" preparation of many of the applications, the Division frequently has found it difficult to reach an informed and equitable decision. Further investigation by the ICC staff often has been required in order to obtain necessary information. Foremost among the complaints in this area are those concerning failure of the applicant or his representative to submit supporting statements which contain all of the information required by Section 240.2(c) of the Temporary Authority Rules. These rules are set forth in Ex Parte No. MC–67, Motor Carrier Tem-

porary Authorities, 98 MCC 483, and 49 CFR 1131 (formerly 49 CFR 340).

According to the clarified policy, Division 1 will deny temporary authority applications in which, because of noncompliance with the rules, a fair adjudication is not possible on the record before the Commission, without prejudice, however, to the filing of a new application conforming to the rules.

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